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September 22, 2006

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2006 SEP 22 PM 4:29
CHIEF CLERKS OFFICE

VIA FAX: (512) 475-4994
The Honorable Judge Wood
The Honorable Judge Walston
State Office of Administrative Hearings
300 West 15th St.
Austin, TX 78701

VIA FAX: (512) 239 3311
LaDonna Castanuela and TCEQ Commissioners
TCEQ Office of the Chief Clerk; MC 105
P.O. Box 13087
Austin, TX 78711-3087

RE: SOAH Docket No. 582-06-1502; TCEQ Docket No. 2006-0195-AIR
Application of Oak Grove Management Co., LLC for Proposed
Air Permit No. 76474 and PSD-TX-1056

Dear Honorable Judges Wood and Walston, Honorable TCEQ Commissioners, General Counsel and Chief Clerk:

Please find enclosed for filing a copy of Protestant's Response to Exceptions to the Proposal For Decision previously filed In the above named and numbered matter. In accordance with TCEQ rules, this copy is being faxed today for filing and the original and 11 copies are being mailed for receipt within 3 days. Also, a copy of the same has been sent to the parties as listed on the certificate of service.

Thank you for your attention to this matter If you have any questions, feel free to contact me.

Sincerely,

Wendi Hammond

Encl.
CC: Certificate of Service List (w/ encl.)

COPY

SOAH DOCKET NO. 582-06-1502
TCEQ DOCKET NO. 2006-0195-AIR

APPLICATION OF OAK GROVE MANAGEMENT COMPANY, LLC FOR PROPOSED AIR PERMIT NO. 76474 AND PSD-TX-1056	§ § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

PROTESTANT'S RESPONSE TO EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS:

COMES NOW Protestant Robertson County: Our Land, Our Lives (Robertson County OLOL) and files this its Response to Exceptions to the Proposal For Decision (PFD) in this case, and in support thereof, respectfully submits the following:

I. THE JUDGES' PROPOSAL FOR DECISION IS FACTUALLY AND LEGALLY CORRECT AND THE PERMIT APPLICATION SHOULD BE DENIED

Contrary to the exceptions raised by Applicant and the Executive Director, the proposal for decision (PFD) does not conclude that utilizing selective catalytic reduction (SCR) and activated carbon injection (ACI) merely are not technically practicable, rather the PFD thoroughly discussed the judges' opinion that, based upon evidence and testimony presented during the hearing, Applicant simply did not carry its burden to prove by a preponderance of the evidence that these proposed technology controls would actually achieve the performance standards promised in the application and draft permit.

Rather than ushering in a doomsday era as predicted by Applicant, the PFD is a refreshing look at reality. It focuses on the fact that nobody really knows what actual emission rates will occur from Applicant's unilateral decision to use the dirtiest coal possible in the largest proposed coal-fired power plant to date with technology never used on a commercial scale before with lignite. The evidence demonstrates that expert opinions differ significantly on what emission rate will actually occur.

Yet despite the conflicting evidence, Applicant's approach to BACT is that the Commissioners should simply trust the opinions of its well-paid corporate experts. After all, the Applicant is "committed to achieving" the proposed emission limits, therefore, there is no need to worry about all of the evidence and testimony demonstrating that lignite creates enormous problems for these control technologies.

On the other hand, the Executive Director's approach to BACT is to pick an emission rate, not based upon the recommendation of his own TCEQ staff, but rather decide the applicable BACT emission limit on his own accord – even though he is not a permit engineer – and require require "post-construction performance testing" to determine whether the emission limit can actually be achieved.

This begs the question – what happens if the plant is built and the Applicant and Executive Director are proven wrong? Arguably, the Executive Director's approach has merit when dealing with an existing facility. If his gamble fails and emission rates are not as low as hoped, no harm is really done because in the end, emissions would still have either decreased or the status quo would remain (as any unfortunate increase can be remedied by simply removing the technology). Similar circumstances simply will not occur for a new plant, especially one of this size and magnitude.

Rather in this case, the draft permit merely excuses any emission limit exceedances that may occur while Applicant's and TCEQ's experts try to figure out what went wrong. Frighteningly, the draft permit excuses these exceedances without any time limitation. So, the public can only wait and see if the Applicant and TCEQ can figure out how to fix the problem -- all the while, being exposed to higher amounts of pollutants for an indefinite amount of time.

The most disturbing aspect of both the Applicant's and Executive Director's approach is that absolutely nothing guarantees that the permit emission limits will remain as promised once the plant is actually built. Well-paid corporate experts and Executive Director's recommendations are often wrong. Also, previous "commitments" by applicants often change after post-construction testing reveals higher emissions than what was permitted. When this occurs, TCEQ has historically been more willing to simply increase permit limits, rather than require stricter pollution controls and processes, much less shut the plant down.

These "trust us" and "let's build the plant to make sure we're right" approaches can wreck havoc for the public leaving long-term devastating effects. For example, the majority of the Commissioners are familiar with the circumstances and outcome surrounding the Holcim cement plant, Permit No. 8996/PSD-TX-454M3 located in Midlothian, Texas. In that case, Holcim's experts believed they could use technology (which has never been used before in this manner) and double production without increasing emissions. TCEQ's experts reviewed the application and the Executive Director recommended that the permit be issued. Despite the public's comments and evidence that serious problems existed with the Holcim's and TCEQ's expert opinions, the Applicant and Executive Director stuck by those opinions. TCEQ issued the permit as is. Tragically, emission limits more than doubled, but TCEQ did not shut down the plant or require Holcim to use other control strategies to achieve the previously "committed" permit emission limits. Rather, TCEQ instructed Holcim to submit a permit application for the necessary emission limit increase. Although the public would now be given an opportunity for a hearing, it was too little to late – the plant was already built. In the meantime, Holcim was allowed to operate at the increased levels for years while permit modification occurred.

The exact same scenario is playing out in this case. It is no surprise that the Applicant's and Executive Director's positions have not changed after the hearing – they most likely would not have changed in the Holcim matter either. The fortunate difference between the Oak Grove and Holcim circumstances is that the public was afforded the opportunity to have a hearing. In this case, after two impartial judges listened to and weighed the credibility of all the evidence and witness testimony, the judges agreed – serious problems exists and the permit should not be issued.

Contrary to the Applicant and the Executive Director arguments, the Commissioners should be very concerned that opinions differ so widely on what the possible the emission rates could be with these control technologies. The final emission limits are arbitrary.

For example, Applicant's vendor was willing to financially guarantee a NOx emission rate for lignite of .05 lbs/MMBtu.[1] This is the exact same rate being used for PRB coal in the already issued Sandy Creek and CPS permits. Yet, when explaining why this emission rate was not BACT, Applicant's expert testified that vendor guarantees are essentially worthless.

On the other hand, TCEQ's expert and Applicant's own employee experts previously concluded that 0.07 lbs/MMBtu of NOx is BACT.[2] However, as discussed in the PFD, Applicant's experts testified lignite causes too many problems with SCR, and the Executive Director decided not to trust his own expert's opinion but rather side with Applicant's.

Meanwhile, Protestant's expert believes lignite would cause so many problems with SCR that even the Executive Director's and Applicant's choice of 0.08 lbs/MMBtu of NOx would not

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[1] Protestant Exhibit P-36.
[2] Protestant's Exhibits P-42 and P-37 (see last paragraph on page 1).

be achieved, which consequently is supported by EPA's position that lignite plants should be able to achieve a 0.11 lbs/MMBtu of NOx.[3]

If the final permit emission limits are lower than what will actually occur, and it is issued, the Holcim debacle will occur again. As discussed in the PFD, the record is saturated with evidence that lignite will cause problems for these control technologies. As a result, the ALJ's correctly state that the since draft permit rates are overly optimistic, the modeling and health impacts are underestimated.

Also, Applicant's expert, Mr. Chichanowicz, testified that power plants burning coals that have less complication with SCR still have to be shut down as often as every 7 months just to clean the buildup inside of the unit – in essence, they are "still learning" how to avoid SCR problems with even PRB coals.[4] Considering Applicant continually emphasizes that lignite would increase these problems, the repetitive maintenance shut downs just to maintain the less stringent 0.08 lbs/MMBtu NOx emission rate may themselves cause exceedences beyond the permit limits. Just how much, no one knows because no one was able to testify how often maintenance would be required. This too could wreck havoc on not only ozone attainment plans but also cause other detrimental health impacts. Which brings us back to the ALJs point that issuing a permit to build a plant to test to see if the plant can actually meet its emission limits is completely backwards.

Alternatively, the Commissioners should be very concerned about what may happen if the emission rates in the application and draft permit are higher than what is reasonably achievable, and therefore, is not BACT. For example, this alone will allow considerably more NOx to be emitted on a daily basis without violation, which would wreck havoc on

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[3] See, the PFD discussion by the judges.
[4] See, Transcript 6/14/06 p. 341, especially lines 22-25.

nonattainment areas and near nonattainment areas for the 8-hour ozone national ambient air quality standard.

The bottom-line is arguments claiming that the permit emission limits are technically feasible, can equally be made for all of the other possible emission limits, it just does not necessarily mean the rates will actually be achieved, which leads us next to ponder about the BACT review determination of "economic reasonableness."

The Applicant claims that a lower emission limit is not economically reasonable, however, the record is void of any economic analysis to support this claim. The BACT review is also void of any cost comparision of using powder river basin (PRB) coal or even a blending of lignite with PRB. Although the executive director makes the conclusory statements that TCEQ is incapable of dictating fuel choice under BACT, no law, rule or regulation is provided. Contrary to this assertion, the BACT review guidance even states that fuel choice is a preferred control strategy method.[5] In fact, the draft permit itself requires a low sulfur fuel to reduce startup emissions.

Also, another technically feasible and economically reasonable alternative exists. For example, Protestant pre-filed testimony explaining that IGCC is a technically feasible, economically reasonable, and commercially available alternative that has been successfully operated with North Dakota lignite for several decades. The ALJs, however, struck the testimony from the record due to the Commissioner's prior ruling in the Sandy Creek case that IGCC is not required to be considered as part of the BACT review. While Protestant disagrees and intends to appeal on this ground, if necessary, Protestant will not at this time discuss the error of the agency's position limiting the BACT review process. Protestant, however, still urges

[5] Oak Grove Exhibit 15, pp. 9-10.

the Commission to reverse the ALJ's ruling and consider the testimony because according to Texas law, the testimony is still legally relevant on other grounds and must be considered.[6]

In the end, Applicant's stubborn desire to use the dirtiest coal possible to maximize its corporate profits creates the majority of the problems with this application and permit.

II. OTHER REASONS FOR DENYING THE PERMIT EXISTS

In light of all available facts and circumstances, Applicant's proposed emissions simply are not reasonable. Even if the Commissioners disagree with ALJ's basis for denying the permit, the Commissioners should still deny the permit and not adopt Applicant's erroneous proposed findings of facts and conclusions of law. Not only do other provisions of the application process and draft permit violate federal and state laws and regulations, but Applicant's proposed emissions simply are not reasonable when considering all of the facts and circumstances.

Texas law requires the commissioners to consider the reasonableness of the proposed emissions. This goes beyond merely considering the limited BACT review consisting of technical feasibility and economic reasonableness. Specifically, Texas Health and Safety Code § 382.024 states:

> In issuing an order and making a determination, the commission shall consider the facts and circumstances bearing on the reasonableness of the emissions, including:
>
> (1) the character and degree of the of injury to or interference with the public's health and physical property;
> (2) the source's social and economic value;
> (3) the question of priority of location in the area involved; and
> (4) the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting form the source.

All of the facts and circumstances, not only in the ALJs' proposal for decision but also throughout the entire comment and hearing process, ultimately answer the overall

[6] See, discussion below concerning TEX. HEALTH & SAFETY CODE § 382.024.

question of whether the proposed emissions are reasonable. The unequivocal answer is a resounding "NO" – Applicant's proposed emissions simply are not reasonable.

Applicant unilaterally decided to build the largest of the recently proposed coal-fired power plants to date and use the dirtiest coal source possible resulting in the highest proposed emission rates – simply to maximize corporate profit. The reasonableness of Applicant's decision simply cannot be reviewed in isolation.

It must be viewed in light of emission limits of other "similar process" PC boiler plants using PRB coal. TCEQ's BACT guidance states that emission reduction performance levels accepted as BACT in recent permit reviews for the "same process" continue to be acceptable if no new technical developments have been made to indicate additional reductions are economically o technically reasonable.[7] Applicant's expert testified that whether a PC boiler burns lignite, subbituminous or a blending of such coals, it qualifies as the "same process" under the BACT review.[8]

Likewise, the emission impacts on 8-hour ozone NAAQS in any air quality control region support denial of the application and permit (as previously discussed in Protestant's filed exceptions and closing argument).

In addition to these facts and circumstances provided in the record, Protestant filed testimony explaining that IGCC is a technically feasible, economically reasonable, and commercially available alternative that has been successfully operated with North Dakota lignite for several decades. The testimony discussed in depth the differences in the character and degree of injury and interference with public's health and physical property between different types of PC boilers filed with a variety of coals, including

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[7] Oak Grove Exhibit 15, p.6.
[8] Transcript, 6/14/06 p.49, line 16 – p.50, line 2.

lignite, in comparison to an IGCC plant. Even if the Protestant is unable to require the Applicant to consider IGCC when conducting the BACT review, nothing prevents Protestant from developing the IGCC comparison alternative under the "reasonableness of emissions" provision of Texas law to develop a complete record of facts and circumstances that bear on whether the emissions proposed by Applicant is reasonable. As such, the Protestant's testimony was erroneously stricken, and the Commissioners should consider this evidence.

III. PERMIT CAN BE DENIED

The law does not prohibit TCEQ from denying the permit application. Section 382.0518 of the Texas Health and Safety Code does not prohibit denial, and the TCEQ has historically denied permit in the past. Rather, the final order issued by the Commission qualifies as the "report" required by law setting out the specific objections. In order to address these objections, the Applicant would have to amend its application, which triggers the legal requirement that the Applicant resubmit the application again to the commission and comply with all notice and other legal requirements as though the application was originally submitted on that day.[9] Only if the public does not request another contested case hearing on the amended application, is the Commission is required to grant the permit.

Also, Applicant is wrong to conclude that that the only remedy is to remove the proposed SCR and AIC control technologies. The Commission is free to specify many other objections for the Applicant to address in an amended application.

For example a complete BACT review that includes support for claims that a lower NOx emission rate is not economically reasonable and comparisons of using only lignite fuel, a blend of lignite and PRB fuel, or only PRB fuel.

[9] Health & Safety Code § 382.0291(d).

If eventually higher emission rates are necessitated, then impacts on 8-hour ozone NAAQs in nonattainment and near nonattainment air quality control regions would have necessarily increased. Although Protestants believe the law requires the Applicant to address this issue in an amended application, the public would have the opportunity to raise this issue again base upon the amended emission limits.

IV. ALL TRANSCRIPT COSTS SHOULD BE ASSESSED AGAINST APPLICANT

Assessment of reporting and transcript costs to Applicant would be just and reasonable considering the circumstances of this case. General rule 30 TEX. ADMIN. CODE §80.23 of the Texas Commission on Environmental Quality ("TCEQ" or the "Commission") addresses transcriptions of hearings. The rule states that the Commission shall consider the following factors in assessing reporting and transcription costs:

1) The party who requested the transcript;
2) The financial ability of the party to pay the costs;
3) The extent to which the party participated in the hearing;
4) The relative benefits to the various parties of having a transcript;
5) The budgetary constraints of the state or federal administrative agency participating in the proceeding;
6) In rate proceedings, the extent to which the expense of the rate proceeding is included in the utility's allowable expenses; and
7) Any other factor which is relevant to a just and reasonable assessment of costs.

The judges' PFD properly considers all of these factors in reaching their decision that Applicant should pay for all of the transcript costs.

In this case, crucial factors to consider include a party's ability to pay and other relevant factors for a just and reasonable assessment of costs. Many of the other listed factors do not apply in this matter. For example, the ALJ ordered the transcript; therefore no party requested the transcript. Also, this is not a rate case, and none of the parties who are potentially liable for

costs is a state or federal agency. Additionally, all parties fully participated in the hearing and used the transcript in writing their closing arguments.

A. Applicant Is the Only Party with the Financial Ability to Pay the Costs

Obviously, Applicant has the financial ability to pay the costs. It testified that it is a multi-billion dollar corporation with a multi-billion dollar plan to seek permitting of not only the Oak Grove power plant subject to this permit hearing but also at least eight more plants throughout the state. Protestant is aware of at least six attorneys working on Applicant's behalf in this matter alone. Also, based upon discussions with Applicant's counsel, it appears that Applicant not only paid for costs pursuant to Order No. 1, but actually ordered and paid for extra packages that only benefited the Applicant.

By stark contrast, the Protestant is a small, local nonprofit organization created as a result of Applicant's permit request in this matter. Protestant's counsel is a private practice attorney that has volunteered much of her time. Also, the only access to a transcript the Protestant could afford was obtaining a copy from TCEQ through the Public Information Act. If a transcript was not available through this low cost means, Protestant would simply have gone without or obtained copies of the SOAH tape recordings of the matter.

B. Circumstances Beyond Protestant's Control Significantly Increased Costs

The Governor's Executive Order RP 49 expedited the entire process. The expedited process increased the transcription costs because the court reporters were required to rush the orders. For example in other typical 3-4 day hearings, transcripts generally cost around $5000; however, in this case the cost is almost four times this amount.[10] As a result, if costs were to be

[10] It is important to note that Protestant requested discovery on this issue to determine Applicant's role in the passage of the Governor's executive order, which would have helped determine whether Applicant played a direct role in the resulting cost increase. Unfortunately, Applicant's objections to these discovery requests were sustained.

assessed to protestants in expedited power plant cases, the Governor's order would cause an extreme hardship on all protestants that wished to preserve their legal rights.

Additionally, Applicant requested a "direct referral;" thus, Applicant voluntarily waived the Commission process for limiting issues subject to a contested case hearing. As a result, the Applicant chose to present evidence from ten testifying witnesses that would be subject to cross-examination, of which eight were part of Applicant's direct testimony. Although depositions during the discovery period may have slightly reduced cross-examination time during the hearing, the Protestant could not afford to depose all of Applicant's witnesses prior to the hearing on the merits.[11]

Moreover, Protestant did not have a meaningful opportunity to question, and receive answers, about the application and draft permit until the hearing on the merits. It is important to remember that Applicant is the first in over two decades to request a permit to build a lignite-fired power plant, and Applicant intends to use technology that had never been used before with Texas lignite. Despite this, Applicant chose to hold its public meeting before its air quality modeling was complete and a draft permit was available for public review, question and comment. Furthermore, the executive director did not provide responses to public comments and concerns until the conclusion of the hearing on the merits. The majority of Protestant's cross-examination focused on Applicant's proposed technology, air quality modeling issues, and related health effects.

Moreover, Applicant failed to comply with SOAH's Order. In Order No. 1, Judge Newchurch found that issuance of the PFD by the deadline imposed by the Governor's Executive

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[11] In fact, Protestant's only deposed two witnesses because of the preliminary hearing agreement that Applicant would cover Protestant's deposition costs of Applicant's TCEQ witnesses so that Applicant could late file their supplemental direct testimony.

Order RP 49 would require a transcript to be filed within one week of the end of the hearing and that:

> The Applicant shall arrange for and pay a court reporter to record and transcribe the hearing on the merits and deliver the **original transcript and two copies to the TCEQ's Chief Clerk** within one week after the end of the hearing. The **delivered transcript shall also include electronic copies thereof on disc** in text format.[12]

Applicant did not comply with Order No. 1, and therefore, received a greater benefit and at the same time increased the transcription costs. Although Applicant's Exhibit A provides an invoice, that invoice fails to provide a complete picture. Based upon a telephone conversation with Kennedy Reporting Service, Inc., Protestant's counsel was informed of the following: only the original transcript was filed with TCEQ, only one hard copy was filed with SOAH, one hard copy was provided directly to the Applicant, and an electronic copy of the transcript was only provided to Applicant. Furthermore, Applicant had requested that the transcript be delivered to Applicant daily rather than at the conclusion of the hearing, which significantly increased transcribing costs and administrative fees.

In essence, Applicant argues that Protestant should not only pay for half of the costs for the original transcript and one hard copy provided to TCEQ and SOAH respectively, but also Protestant should pay half the costs for a hard copy of the transcript that only benefited the Applicant. As previously stated in its initial brief, the Protestant was only able to obtain a hard copy of the transcript from TCEQ. It simply would not be "just and reasonable" to require Protestant to pay for something that did not comply with Order No. 1, much less something that only benefited the Applicant.

Furthermore, Protestant has nothing to gain in this proceeding except to ensure the protection of its members' health and property. The entire process was put in motion through an

[12] Order No. 1, SOAH docket No. 582-06-1502 (emphasis added).

application of Oak Grove to make money. If Applicant was not expecting profits and a return on its investment, Applicant never would have filed the application in the first place. As such, it is the Applicant, not the Protestant or other parties, who has the burden of proof in the hearing and needs the transcription.

Although Applicant argues that Protestant's consumed most of the hearing time, the fact remains that all of the parties questioned witnesses. The fact that Protestant questioned the witnesses thoroughly does not directly imply that the Protestants participated more than the other parties. The ALJs decided the order of cross examination; thus, the Protestant had no choice but to cross-examine first.

V. CONCLUSION AND PRAYER

Protestant respectfully requests that the Commissioners adopt the PFD with Protestant's previously filed Exceptions and follow SOAH's recommendations to deny Oak Grove's permit application and draft permit and assess all transcript costs to Applicant.

Respectfully submitted,

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ATTORNEY FOR ROBERTSON COUNTY: OUR LAND, OUR LIVES

CERTIFICATE OF SERVICE

I hereby certify that on this the 22nd day of September, 20 06, a true and correct copy of the foregoing has been sent by U.S. mail, facsimile and/or email (as indicated below) to the following:

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